

1976

# Clearfield State Bank v. James G. Contos : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT FOR THE  
STATE OF UTAH

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CLEARFIELD STATE BANK,	/	
Plaintiff and	/	
Appellant,	/	
vs.	/	Case No. 14521
J. G. CONTOS, a/k/a	/	
JAMES G. CONTOS,	/	
Defendant and	/	
Respondent.	/	

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BRIEF OF RESPONDENT

Appeal from the Decision of the First Judicial  
District Court for Weber County, Utah  
The Honorable Ronald O. Hyde, Judge

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT FOR THE  
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CLEARFIELD STATE BANK,	/	
Plaintiff and	/	
Appellant,	/	
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J. G. CONTOS, a/k/a	/	
JAMES G. CONTOS,	/	
Defendant and	/	
Respondent.	/	

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BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action brought by the Appellant against the Respondent seeking an Order of the Court for possession of merchandise allegedly secured to the Plaintiff on the basis of a secured transaction entered into by the Respondent only, and which secured transaction was not subscribed to by the wife of the Respondent and wherein the wife at all times has been in possession of the secured collateral and has not acquiesced to the transaction as between the Respondent and the Appellant in entering into a security agreement.

#### DISPOSITION IN LOWER COURT

Upon a hearing held in the Lower Court before the Honorable Ronald O. Hyde, the Court held that the Respondent's wife was not a party to the contract nor to the action before the Lower Court and that the Court could not deprive the wife of the Respondent of possession of property which she owns and thereby decreeing a Judgment of no cause of action as to the claim of the Appellant.

#### RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the Judgment of the Lower Court denying to the Appellant the right to deprive the wife of possession and ownership of property which she has possessed at all times and owns.

#### STATEMENT OF FACTS

The Appellant, Clearfield State Bank, who was the Plaintiff in the Lower Court, will be referred to herein as the "BANK" and the Respondent, who was the Defendant in the Lower Court, will be referred to herein as the "HUSBAND".

On or about January 4, 1974, the Bank entered into a loan with the husband. A secured agreement was subscribed to only by the husband (Pl.Exh.1) and wherein all of the household furniture, furnishings, appliances, and other

household items were pledged as security and collateral for said loan, with the disclosure statement and listing of the household items also being signed only by the husband (Pl.Exh.2).

The Appellant-Bank indicated on Plaintiff's Exhibit 2, that the items pledged were used for "personal, family or household purposes" (Pl.Exh.2).

The husband advised the Bank, that the items were also owned by his wife and that she absolutely refused to sign and be a party to the secured transaction and the Bank entered into the loan, taking the household items of the husband and wife as security, even though the husband advised the Bank that the wife had refused to sign, and the loan was concluded even though the wife's signature was not obtained or subscribed to the loan transaction (R-15).

The husband further testified, that during the entire ten years of the husband's marriage, the wife had been gainfully employed for Sperry Rand, Better Business Bureau of Salt Lake, a Salt Lake dentist, the Community Credit Counseling in Ogden, J. C. Penney's, and other employers averaging a minimum of \$3,500.00 per year income over the ten-year period and unemployed only during periods of childbirth. (R-15)

A Petition in Bankruptcy was filed in the United States



District Court for the District of Utah, Northern Division, by the husband and the Bankruptcy Court disclaimed any interest in the security in February, 1975, R-28), which date of Disclaimer was subsequent to the filing of the Complaint of the Appellant in the Lower Court, and occurred on January, 1975, (R-2), naming therein the husband only as a Defendant in the action of the Lower Court, which is on appeal before this Court.

#### ARGUMENT

##### POINT I

#### CONSTITUTIONAL AND STATUTORY RIGHTS OF WIFE CANNOT BE DETERMINED AGAINST HER WILL.

The husband entered into a secured contract with a knowledgeable creditor, the Appellant herein, a commercial Bank, (R-1,R-3) knowing that the collateral was being used for personal, family, or household purposes (R-13). The husband had advised the Bank, that the wife was also an owner and that she "absolutely refused to sign the secured agreement" (R-15), and the secured transaction was consummated as between the husband and Bank with the signature of the husband only (R-17).

The Appellant further had knowledge of the filing of the Petition in Bankruptcy by the husband (R-21) and the Appellant-Bank brought an action seeking recovery of the home

furnishings and personal property of the husband and wife naming only the husband as a Defendant therein.

The Constitution of the State of Utah in Article XXII, Section 2 thereof, recognizes the right of every female to the ownership of real and personal property, either acquired before marriage, or any property to which she may afterwards become entitled by purchase, gift, grant, etc., and further provides that such property acquired by the female person shall be and remain the estate and property of such female and shall not be liable for the debts, obligations, or engagements of her husband.

The testimony before the Court evidenced that the wife had been employed during the entire ten years of her marriage to the husband, except for periods of childbearing, and that the monies for the acquisition of the household furniture and furnishings came from both the husband and wife, together with a loan made from the wife's mother, to acquire the household goods (R-15).

78-23-1 (1 through 14), Utah Code Annotated, as amended 1953, and as amended laws of Utah 1969, specifically establishes the exemption of items of household furniture, furnishings, appliances, and other specific goods, and the holding of the

Utah Supreme Court in Kimball v. Salisbury, 17 Ut. 381, 53 P. 1038, can by analogy be applied to Title 78 of the Exemption Statute of the State of Utah, wherein the Court held in this case, that the exemption conferred by statute is not a privilege conferred upon the head of a family, but an absolute right intended to secure and protect exempt property against creditors, as a means of support to every family in the State, and it is submitted that, therefore, the exemptions provided in Title 78 should apply to the wife as well as to the husband (Emphasis added).

It is further submitted to the Court, that the analogy as between the Homestead Exemption rights and the exemptions provided in Title 78 be treated in the same manner as this Court held in Panagopoulos v. Manning, 69 P.2d 614, Supreme Court of Utah (1937), wherein this Court held that the exemptions provided under the homestead right is founded on public policy and that the statute provides that the homestead shall be exempt from Judgment or lien or from execution or for sale is remedial, and must be broadly construed to accomplish its beneficent purpose.

This Court has previously stated and has repeatedly held, that the homestead right as provided for in 28-1-1, Utah Code Annotated, as amended 1953, is founded on public

policy and is fundamental to in the making of good citizens in a free government and is one of the foundation stones upon which stability of government rests, and that the statute is remedial in order to accomplish its beneficent purpose. The citations in support of this view of the Court is found in Kimball v. Salisbury, supra; Hansen v. Mauss, 40 Ut. 361, 121 P. 605; Payson Exchange Saving Bank v. Tietjen, 63 Ut. 321, 225 P. 598; Utah Builders Supply Company v. Gardiner, 86 Ut. 250, 39 P.2d 327. It is submitted that there should not be a distinction as between the Court's holding in regards to the Homestead Exemption Act as against the more life and family sustaining exemptions set forth by statute in Title 78-23-1 (1 through 14), Utah Code Annotated, as amended 1953, and as amended laws of Utah 1969).

## POINT II

WIFE CANNOT BE DEPRIVED OF HER PERSONAL PROPERTY  
WITHOUT DUE PROCESS OF LAW.

The wife is not a Defendant to the action on appeal before this Court and was not a party-Defendant in the Lower Court.

The Legislature of Utah, and in whom the Constitution vests the exclusive right to enact law, has formerly declared in Section 68-3-1, Utah Code Annotated, as amended 1953, that:

The Common Law of England so far as it is not repugnant to or in conflict with the Constitution or laws of the United States or the Constitution or laws of this State \*\* is hereby adopted, and shall be the rule of decision in all Courts of this State.

In Johnson v. Union Pacific Coal Company, 28 Ut. 146, 76 P. 1089, the Utah Supreme Court declared that, "the Common Law of England" so referred to refers to that law as of the date of the Declaration of Independence on July 4, 1776.

There is no provision of the Utah Constitution nor by the statutes of the State of Utah specifically repugnant to an estate by the entirety as to the personal property of a husband and wife and such estate did exist under the Common Law, as well as an estate by the entirety as to real property.

There are a number of statutory instances wherein the Legislature of the State of Utah has enacted statutes which makes specific reference to tenancies by the entirety as a possible estate and by lending support to the Common Law concept of estates by the entirety of both personal and real property.

In 78-41-1, Utah Code Annotated, as amended 1953, this statute makes reference to possible estates existing in the State of Utah, and specifically refers to a tenancy by the entirety as a possible estate which would be effected by the termination of a life estate in reference therein.

In 48-1-4(2), Utah Code Annotated, as amended 1953, the Statute sets forth the rules for determining the existence of a partnership and the type of estate that may exist thereunder, and makes reference to the effect of particular statutes as to a tenancy by the entirety.

27 A.L.R. 826 makes a definition of a marital estate and the nature of it is set forth therein as follows:

An estate of the entirety exists only between husband and wife, being an outgrowth of the marital relation based upon the theory of the legal unity of the two; it is, however, a unit of indivisible parts vesting in two distinct persons (husband and wife) who are, however, regarded in law as one and the same. In this regard, the estate differs from a joint tenancy. Because of the indivisibility of the estate and the fact that it vests absolutely in the survivor, a very serious question has been presented as to whether or not any portion of the estate may be subjected to the payment of the individual debts of one of the spouses.

An estate by the entirety is a form of co-ownership in real and personal property held by husband and wife with right of survivorship. Its essential characteristic is that each spouse is seized per tout et non per my; that is of the whole or one of the entirety and not of a share, moiety, or divisible part as was defined in Gasner v. Pierce, 286 Pa. 529, 134 A. 494; C.I.T. Corporation v. Flint, 333 Pa. 350, 5 A.2d 126.

It is, therefore, submitted to this Court, that the Appellant in bringing an action against the Respondent only, without including the wife in said action, could not destroy the interest of the wife in the household furnishings and no possession of the collateral of the property, which was the property as much that of the wife as of the Respondent, could be achieved and perfected without the wife being a party to such action.

In Louis Licker, et ux, v. Gluskin, 164 N.E. 613, the Massachusetts Supreme Judicial Court held that the Common Law rights and disabilities of both husband and wife attach to the interest and title of each arising under a tenancy by the entirety, and that the tenancy of the husband and wife in the entirety is essentially a tenancy modified by the Common Law theory of unity of husband and wife, in that they do not take by moieties, but by entireties. The Court further held that the characteristic of a tenancy by the entirety at Common Law continues unaffected by the modern statutes designed to ameliorate the rights of married women at Common Law and to render more flexible and individual the property rights of husband and wife. The Court further held:

That these indubitable Common Law rules require the conclusion, that a creditor cannot do with a right of a tenant by the entirety that which the tenant cannot do.

It is further submitted to the Court, that the Argument of the Appellant as set forth in its Brief before this Court and which Argument is based purely upon the application of the provisions of the Uniform Commercial Code in establishing the rights of the Appellant, was the Argument used in the Lower Court and considered by the Honorable Ronald O. Hyde and there is not much more to add to his findings, wherein the Court held:

The evidence indicates, however, that the Defendant's wife has an ownership interest in the property. The Defendant's wife was not a party to the contract. It is not a question of priorities of security interest. Defendant's wife's ownership interest is superior to Plaintiff's security interest. Defendant cannot defeat an ownership interest of another party by making a warranty of ownership. Defendant's warranty of ownership may well make the obligation between Plaintiff and Defendant non-dischargeable from misrepresentation, however, this Court cannot order him to deliver possession of property he does not own. Defendant's wife is not a party to the contract or to this action, and an Order from this Court depriving her of possession of property she owns would not be lawful. (R-39)

In Parry v. Bonneville Irrigation District, 263 P. 751, Supreme Court of Utah (Jan., 1928), this Court held:

It is, of course, an elementary rule of law, that there can be no judicial action affecting vested rights that is not based upon some process or notice whereby the interested parties are brought within the jurisdiction of a judicial tribunal about to render Judgment.



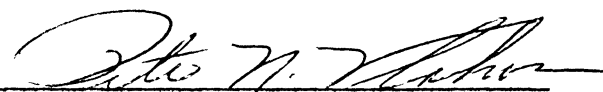
In Johnson v. Hattram, et al, 275 P. 913, Supreme Court of Oregon (1929), the Court held that where there was no evidence attempting to show that the wife had any connection with the transaction out of which the Plaintiff's right of action arose, or that her husband was her agent, or had authority to transact business for her, that the wife could not be jointly liable with the husband in an action for money had and received.

It should be further noted by the Court, that the parties are still husband and wife at the time of the action and at the present time, and that there has been no evidence offered by the Plaintiff to the contrary nor to attempt to prove that the husband and wife are living in separate establishments. The wife has been in possession of the property at all times relative to the matter before the Court, and the solution of the Appellant, that the Appellant be allowed to obtain possession of the property of the wife with the wife having a right to file a suit against her husband for a loss suffered by her as provided under Section 70A-9-112 of the Commercial Code, is hardly a workable solution to the depriving of the wife of her ownership and interest in the household furnishings. (App.Br., p.3)

### CONCLUSION


It is, therefore, submitted to this Honorable Court, that the Judgment of the Lower Court denying to the Appellant the right to deprive the wife of possession of property in which she has an ownership interest and which consists of the household goods purchased by the joint efforts of the Respondent-husband and wife, cannot deprive the wife of such necessities upon an allegation, that a knowledgeable lender undertook to make a loan and seek a security interest against the will of the wife upon the basis of an adhesion clause in a contract which alleges that the Respondent, by making a warranty of ownership, could divest the wife of her title and interest to the family household goods.

Respectfully submitted,

By   
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CERTIFICATE OF MAILING

A copy of the foregoing Brief of Respondent was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Appellant, Carl T. Smith, Esq., 520 - 26th Street, Ogden, Utah 84401, on this 7 day of October, 1976.

  
\_\_\_\_\_  
Jeannine Stowell, Secretary